Supreme Court, U.S.
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No. 95-1441

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,
Petitioner,

v.

CATHY FREESTONE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION TO CONSIDER REMANDING THIS CASE OR DISMISSING CERTIORARI AS IMPROVIDENTLY GRANTED IN LIGHT OF THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996, PUB. L. NO. 104-193 (AUGUST 22, 1996)

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MOTION TO CONSIDER REMANDING THIS CASE OR DISMISSING CERTIORARI AS IMPROVIDENTLY GRANTED IN LIGHT OF THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996, PUB. L. NO. 104-193 (AUGUST 22, 1996)

This Court granted certiorari in this case on May 13, 1996, to decide the following Question Presented:

> Whether custodial parents seeking child support from noncustodial parents can sue state officials under 42 U.S.C. § 1983 for alleged violations of Part IV-D child support program agreements between the States and the federal government when such suits will contravene this Court's precedents, not necessarily remedy a custodial parent's grievances, and violate core principles of federalism and separation of powers. [Petition for Writ of Certiorari at (i).][1]

The reference to "Part IV-D" is to a component of Part IV of the Social Security Act, as amended, 42 U.S.C. § 601 *et seq.*, which governs "Grants to States for Aid and Services to Needy Families with Children . . . ."

On August 22, 1996—well after certiorari was granted and petitioner's brief on the merits was filed—the President signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, popularly known as the welfare reform bill. That Act makes basic structural changes in Part IV-A of the Social Security Act, governing monetary welfare benefits to families with children, and substantially amends Part IV-D while retaining the fundamental structure of that Part.

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[1] Petitioner's brief on the merits ("Pet. Br.") includes as "Questions Presented" three different questions. Pet. Br. at (i). Whether that brief's three questions are fairly included in the single one raised in the petition is dubious, and is an issue we intend to discuss in our brief on the merits. *See* Supreme Court Rules Rule 14.1(a).

Pursuant to "counsel's . . . continuing duty to inform the Court of any development which may conceivably affect an outcome" of a case on which certiorari has been granted" (*Fusari v. Steinberg*, 419 U.S. 379, 391 (1974) (Burger, C.J., concurring); *see also id.* at 387 n.12 (opinion for the Court)), this Motion presents the relevant differences between Part IV as it existed at the time of the Ninth Circuit decision and the grant of certiorari and Part IV as amended, and indicates why those differences may be relevant to the consideration of this case.

1. This Court has deemed post-certiorari-grant statutory changes that could substantially affect this Court's consideration of the case to be the basis for orders either dismissing certiorari as improvidently granted or remanding the case for consideration in light of the new statute. *See, e.g., Woods v. Durr*, 336 U.S. 941 (1949) (per curiam) (after grant of writ of certiorari, vacating and remanding to the Court of Appeals for consideration of the effect of a newly-enacted federal statute); *Jenkins v. Brewer*, 450 U.S. 904 (1981) (per curiam) (same); *Morris v. Weinberger*, 410 U.S. 422 (1973) (per curiam) (dismissing certiorari as improvidently granted because "[t]wenty days after this Court granted a writ of certiorari . . . Congress amended the relevant statutory provisions.").

The reasons for so proceeding were suggested by Justice Scalia last term in a case in which members of the Court otherwise disagreed about the scope of this Court's authority to grant certiorari, vacate the judgment below, and remand for further consideration ("GVR"), but agreed that such action *is* proper, and traditional, where there has been a change in the governing statute after the Court of Appeals decided the case. Declining to decide in the first instance the impact of a newly-enacted statute not considered by the Court of Appeals is

> appropriate to preserve the operational premise of a multitiered judicial system (*viz.*, that lower courts will have the first opportunity to apply the governing law to the facts) and to avoid the unseemliness of holding judgments to be in error on the basis of law that did not exist when the judgments were rendered below. They thus serve the interests of efficiency and of concern for the dignity of . . . lower federal tribunals. [*Stutson v. United States*, 116 S. Ct. 611, 613-14 (1996) (Scalia, J., dissenting).]

See also Lawrence on Behalf of Lawrence v. Chater, 116 S. Ct. 604, 606 (1996) (per curiam) ("a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, . . . [and] assists this Court by procuring the benefit of the lower court's insight before we rule on the merits.")

2. To aid the Court in evaluating whether the present situation is one in which the post-certiorari statutory changes counsel against deciding the case on the merits at this juncture, we begin by summarizing the underlying statutory scheme and its relationship to this case.[2]

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[2] We note that, aside from the statutory changes discussed in the text, there was another intervening change between the time of the Ninth Circuit decision and the present that this Court may wish to take into account in considering the appropriate course with respect to plenary review. In addition to arguing that there is no 42 U.S.C. § 1983 cause of action here, petitioner argues in her merits brief at some length that, under this Court's decision last term in *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), issued after the petition was filed, any such cause of action would violate the Eleventh Amendment. Pet. Br. at 23-30. No Eleventh Amendment argument was presented to the Ninth Circuit or in the certiorari petition.

Had petitioners raised any Eleventh Amendment issue in their petition, this Court would have had an opportunity to consider when it acted on the petition whether the case should be "GVR'd" under this Court's practice of remanding to courts of appeal for further consideration where a new decision of this Court may be relevant. *Stutson v. U.S.*, 116 S. Ct. at 613 (Scalia, J., dissenting) (listing cases in which this Court has remanded for consideration of a postjudgment decision of this Court); *Lawrence on Behalf of Lawrence v. Chater*, 116 S. Ct. at 606 ("[w] have GVR'd in

States that accept funds from the federal government to provide welfare benefits to needy children are required, as a condition of accepting those funds, to provide extensive child support services, prescribed by the federal statute in exacting detail (and by implementing regulations expressly called for in the statute), both to children who receive welfare benefits and to all other children whose custodial parent applies for such services. 42 U.S.C. § 602(a)(27) and §§ 651-69. The child support services those states must provide include locating absent parents and establishing paternity, and establishing and enforcing child support obligations for absent parents (including the obligation to provide medical insurance). The federal government in large part funds these child support services provided by the states, and the Social Security Act also provides that states may retain most of the support collected from absent parents on behalf of children receiving welfare benefits, as reimbursement for the welfare benefits provided. 42 U.S.C. §§ 651, 655, 657. The statute as effective at the time of the Ninth Circuit's decision also provided that where the state did collect child support payments on behalf of any child receiving welfare benefits from an absent parent, the first $50 collected was to be remitted by the state to the custodial parent, and not used by the state to reduce or reimburse the welfare payments due. 42 U.S.C. § 657.

This case began with a class action complaint alleging that the state of Arizona was accepting both Part IV-A and Part IV-D funds from the federal government but was failing on a systematic basis to provide the child

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light of a wide range of developments, including our own decisions, see *post*, 613-614 (Scalia, J., dissenting.").

This Court *can*, of course, consider Eleventh Amendment issues raised for the first time in this Court. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945). Whether it is desirable to do so is another question, for many the same reasons that counsel against considering the impact of a new statute in the first instance.

support services required by Part IV-D, or to provide the $50 "pass-through" payments to custodial parents in a timely manner. Joint Appendix (App.) 12-13, 22, 40-41. The relief sought is purely prospective. App. 42.

The district court dismissed the case on summary judgment for failure to state a cause of action under 42 U.S.C. § 1983. Pet. App. 10b. The sole question decided by the Ninth Circuit on appeal was whether a cause of action is available under 42 U.S.C. § 1983 to enforce the detailed requirements of Part IV-D itself and of the extensive regulations promulgated, pursuant to express statutory direction, by the Secretary of Health and Human Services. Pet. App. 36a.[a]

3. In answering that question, the Ninth Circuit applied this Court's analysis in *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), as amplified two years later in *Suter v. Artis M.*, 503 U.S. 347 (1992). Pet. App. 14a. As the Ninth Circuit's opinion makes clear, that analysis is heavily dependent upon the precise provisions of the statutory scheme the plaintiffs seek to enforce under § 1983. Thus, in the course of its decision, the Ninth Circuit compared the statutory scheme in this case with the one in *Wilder* and the one in *Suter*, and concluded that Parts IV-A and IV-D, as here pertinent, more resemble the *Wilder* statute, in which this Court found an enforceable right, than the *Suter* statute, in which this Court found no such right. The Ninth Circuit's analysis paid particular attention to the following statutory provisions, among others: in Part IV-A, 42 U.S.C. § 602(a)(27), and the phrase "substantial compliance" in that section; in Part IV-D, 42 U.S.C. § 654(4)(A), § 654(13), and § 666; and in both Parts, the pass-through and gap-payment provisions, 42 U.S.C. §§ 602(a)(28), 657(b). Pet. App. 14a, 15a, 30a, 31a.

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[a] As we explain in the Appendix, the relevant provisions in the Reconciliation Act have various effective dates. The most pertinent provisions are effective either immediately or on October 1, 1996.

Judge Kleinfeld, dissenting, also viewed the case as involving the "analytic task to reconcile *Suter* . . . with *Wilder* . . . and apply the principles of those cases to the statute in this case." Pet. App. 38a. And Judge Kleinfeld also discussed the statutory language and structure of Parts IV-A and IV-D in great detail, maintaining that "[t]he 'substantial compliance' standard does not 'unambiguously confer' enforceable rights on any individual" (Pet. App. 39a), and developing his conclusion to that effect based on the exact language of 42 U.S.C. §§ 602(a)(27), 652(a), and 652(i), among other sections. Pet. App. 39a, 40a, 43a.

4. By the same token, in their certiorari papers petitioners argue that "in evaluating whether a particular satutory scheme creates 'enforceable rights,' the Court must carefully examine the particular provisions involved to ensure that Congress intended to create a right or privilege that warrants private enforcement." Pet. 15. And petitioners recite the statutory scheme in detail, citing with particularity, among other provisions, 42 U.S.C. § 602(a)(27), § 652 (governing the Secretary's regulating and auditing functions), and § 652(a)(4) (providing in particular for audits by the Secretary for "substantial compliance" under § 603(h) at least once every three years).[4]

In their brief on the merits, petitioners again stress that to determine under this Court's precedents whether or not a statute creates enforceable rights for purposes of 42 U.S.C. § 1983,

> the Court 'must examine exactly *what* is required of States by the Act,' taking 'pains to analyze the statutory provisions in detail, in light of the *entire* legislative enactment, to determine whether the language in question created 'enforceable rights, privileges or immunities within the meaning of 1983.' *Suter*, 503 U.S. at 357-58 (emphasis added) (quoting *Wright* [*v. Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 423 (1987)]; *see also Pennhurst* [*State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)] (examining specific section 'in the context of other more specific provisions of the Act.'). [Pet. Br. 13.]

[4] Included in Appendix D to the Petition as pertinent statutes were Part IV-A §§ 402(a)(27) and 403(h) (42 U.S.C. §§ 602(a)(27) and 603(h)), and Part IV-D § 452 (42 U.S.C. § 652).

And petitioners proceed to engage in precisely that detailed, contextual statutory analysis, relying once again on language from both Part IV-A (42 U.S.C. § 602(a)(27), in particular), and Part IV-D (42 U.S.C. § 652(a)(4), most prominently). Pet. Br. 14-23.[5]

5. Like the Ninth Circuit, we disagree with petitioner and its amici concerning both the import of this Court's precedents concerning the nature of § 1983 enforceable rights and the proper interpertation, in light of those precedents, of the pertinent provisions of Parts IV-A and IV-D of the Social Security Act. At the same time, there is one point that unites the Ninth Circuit majority and dissent, the petitioner, and respondents: We all agree that this Court's established § 1983 enforceable rights analysis requires that the Court "analyze the statutory provisions in detail, in light of the entire legislative enactment, to determine whether the language in question created 'en-

[5] The amicus curiae briefs filed on behalf of petitioner also recognize that this Court's precedents concerning the applicability of § 1983 to a particular federal statute depends upon a detailed, reticulated, and contextual statutory examination, and proceed to engage in such an examination. *See especially* Brief of *Amici Curiae* Illinois et al. at 4 (the enforceable rights issue depends upon "legislative history, the language of the statutes themselves, and the structure of the statutory scheme as a whole"); *id.* at 6-12 (discussing the historical development of Part IV-D); *id.* at 17 & 23 (discussing the audit provisions of the statute, 42 U.S.C. § 652(a)(4)); Brief of the Council of State Governments et al. as *Amici Curiae* in Support of Petitioner, at 15-25 (discussing at length the language and structure of Parts IV-A and IV-D, emphasizing in particular the exact wording of 42 U.S.C. § 602(a)(27) and §§ 652 and 654).

forceable rights, privileges or immunities within the meaning of § 1983.'" *Suter*, 503 U.S. at 357-58, quoting *Wright*, 479 U.S. at 423. That point of agreement makes pertinent that, by reason of the August 22, 1996 amendments, the "entire legislative enactment" in effect when the Ninth Circuit decided this case, when certiorari was granted, and when petitioners filed their brief is not the "entire legislative enactment" in effect now and in the future.

That point is particularly pertinent because the complaint in this case seeks only prospective relief against ongoing conduct, so that the relevant statutory provisions are the ones in effect when the case is decided, not those in effect when the complaint was filed. *Fusari v. Steinberg*, 419 U.S. at 387; *Tully v. Mobil Oil*, 455 U.S. 425, 247 (1982); *see also Landsgraf v. USI Film Products*, 114 S. Ct. 1483, 1499 n. 23, 1501 (explaining that "[w]hen the intervening statute . . . affects the propriety of injunctive relief" application of that new statute is "unquestionably proper".) In preparing our brief we therefore have been faced with the need to discuss in detail a statutory scheme in many critical respects very different from the one previously canvassed in this case. It is in the course of doing so that we have come to the conclusion that the statutory changes are sufficiently widespread and relevant that we have an obligation under *Fusari* to bring them to the attention of this Court at this time.[6]

The particular changes made by the new statute which may affect this Court's ultimate conclusion whether or

[6] The difficulty of analyzing for the first time a complex statutory scheme never before addressed either in this case or any other has been compounded for respondents, and is likely to be compounded for the Court, by the fact that so far as we can determine there is as yet no available, integrated version of the Social Security Act that correlates the eighty-eight pages of amendments to Part IV-A (as printed in the House Conference Report) and the sixty-four pages of amendments to Part IV-D with the prior provisions so that the relevant statutory provision can be read in context and as a coherent whole.

not § 1983 creates enforceable rights are set out in detail in Appendix A, attached hereto. Those changes include, most prominently, fundamental alterations in the two of the provisions most often cited by petitioners and their amici in support of their position, 42 U.S.C. § 602 (a)(27), providing that the state's child support services obligation is a condition of receiving federal funds under Part IV-A, and 42 U.S.C. § 652(a)(4), providing for federal review and auditing in order to enforce that obligation.

6. We hasten to add that we do *not* believe the statutory changes worked by the Reconciliation Act ultimately will alter the appropriate answer to the question whether a cause of action lies under 42 U.S.C. § 1983 to enforce the child support service requirements that the states promise to provide in exchange for receiving federal funds under both Part IV-A and Part IV-D. Rather, the Ninth Circuit's conclusion that § 1983 provides such a cause of action is all the more correct in light of the recent amendments.

Nonetheless, those amendments do raise questions concerning the necessity and wisdom of proceeding with plenary review of this case. The petition for writ of certiorari was premised squarely upon a circuit conflict on the viability of § 1983 actions to enforce Part IV-D. Pet. 8. Resolving that conflict is of much less importance now. Because the underlying statute has changed, the Courts of Appeals that have addressed the question may not reach the same conclusion in a future § 1983 case brought under Part IV-D.

Moreover, the Court, if it hears this case on the merits, will be construing and applying brand new, complex statutory provisions that neither any other court nor the administrator involved in enforcing § IV-D has had any opportunity to consider. "[T]he operational premise of a multitiered judicial system (*viz.*, that lower courts will have the first opportunity to apply the governing law to

the facts") (*Stutson v. United States*, 116 S. Ct. 611, 613 (Scalia, J., dissenting)) may well counsel against doing so.

CONCLUSION

For the reasons stated above, the Court should take notice of developments after the petition for writ of certiorari was granted and consider whether to remand this case or dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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APPENDIX

APPENDIX

PERTINENT CHANGES MADE BY THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996, PUB. L. NO. 104-193, IN PARTS IV-A AND IV-D OF THE SOCIAL SECURITY ACT

(a) Previously, Part IV-A of the Social Security Act ("SSA") provided that to receive federal matching funds for aid and services to needy families with children, states must submit a state plan containing a number of detailed provisions, among them a provision that:

> the State has in effect a [p]lan approved under part [IV-D of the SSA] and operates a child support program in substantial compliance with such plan. [42 U.S.C. § 602(a)(27).]

The Reconciliation Act entirely replaces Part IV-A with a provision for "Block Grants to States for Temporary Assistance for Needy Families," eliminates 42 U.S.C. § 602(a)(27), and substitutes a provision that reads as follows:

> As used in this part, the term 'eligible State' means, with respect to a fiscal year, a State that, during the 2-year period immediately preceding the fiscal year, has submitted to the Secretary a plan that the Secretary has found includes the following: . . .
>
> . . . (2) *Certification that the State will operate a child support enforcement program.*—A certification by the chief executive officer of the State that, during the fiscal year, the State will operate a child support enforcement program under the State plan approved under part D. [Reconciliation Act § 103(a)(2), amending SSA § 402, 42 U.S.C. § 602; Conf. Rep. 11.] [1]

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[1] Citations to the Reconciliation Act are accompanied by page references to the new Act as printed in the Conference Report to

Among other differences, this provision establishing the nature of the state's commitment in accepting funds under Part IV-A does not contain the "substantial compliance" language of the analogous section in the prior statute, 42 U.S.C. § 602(a)(27), discussed extensively by both Ninth Circuit opinions and by petitioners and their amici.

(b) Part IV-A now contains four similar, pertinent provisions with no parallel in the earlier statute.

(i) Section 103 of the Reconciliation Act, (Conf. Rep. 10), adds SSA § 401(b), 42 U.S.C. § 601(b), which provides:

> This part [Part A] shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.

(ii) Section 103 of the Reconciliation Act (Conf. Rep. 36), adds SSA § 408(a)(7)(E), 42 U.S.C. § 608(a)(7)(E), which provides:

> Subparagraph A shall not be interpreted to require any State to provide assistance to any individual for any period of time under the State program funded under this part.

(iii) Section 116(b)(1)(C) of the Reconciliation Act (Conf. Rep. 83), provides:

> The submission of a plan by a State pursuant to subparagraph (A) is deemed to constitute— . . . .
>
> (ii) the termination of any entitlement of any individual or family to benefits or services under the State AFDC program.

Accompany H.R. 3784, H.R. Rep. No. 104-725, 104th Cong., 2d Sess. (1996) (hereinafter "Conf. Rep."), a copy of which is being lodged with the Court along with this Motion.

The provisions in the Reconciliation Act become effective on various dates. Reconciliation Act § 103(a)(2), set forth above, is effective on the date on which a State submits a new part IV-A State plan or July 1, 1997, whichever is earlier. Reconciliation Act §§ 116(a)(1) and (b)(1)(A), Conference Rep. 81.

(iv) Section 116(c) of the Reconciliation Act (Conf. Rep. 84), provides:

> Effective October 1, 1996, no individual or family shall be entitled to any benefits or services under any State plan approved under part A or F of title IV of the Social Security Act (as in effect on September 30, 1995).

The original welfare reform bill introduced in the 104th Congress had contained similar statements with respect to the entitlement to individuals to services under Part IV-D. H.R. 4, § 302, 104th Cong., 1st Sess. (January 4, 1995):

> [A]ll entitlement of individuals to benefits established under the following programs . . . is terminated . . . The program of aid and services to needy families with children under part A . . ., the child support enforcement program under part D . . . and the at-risk child care grant program under part A.

The statutory statements in the Reconciliation Act regarding nonentitlement to certain benefits and services, and the pointed failure to include Part IV-D in those statements while extensively amending IV-D otherwise, as noted below, are relevant in determining that Part IV-D as amended creates enforceable rights.

(c) The audit and penalty provisions linking Parts IV-A and IV-D have been changed as follows:

Prior SSA § 403(h), 42 U.S.C. § 603(h) provided that:

> [I]f a State's program operated under part D . . . is found as a result of a review conducted under section 452(a)(4) [42 U.S.C. § 652(a)(4)] not to have complied substantially with the requirements of such Part . . . the amount otherwise payable to the State under this part for such quarter and each subsequent quarter, prior to the first quarter throughout which the State program is found to be in substantial

> compliance . . . shall be reduced [by specified percentages].

Substantial compliance was defined as full compliance, except for:

> noncompliance . . . of a techanical nature which does not adversely affect the performance of the child support enforcement program. [42 U.S.C. § 602(h)(3).]

The audit section, implementing this penalty provision, was contained in Part IV-D, and read:

> 42 U.S.C. § 652(a)(4): The Secretary shall . . . (4) evaluate the implementation of State programs established pursuant to such [State IV-D] plan, conduct such audits of State programs established under the plan approved under this part as may be necessary to assure their conformity with the requirements of this part, and, not less often than once every three years . . . conduct a complete audit of the programs established under such plan in each State and determine for the purposes of the penalty provision of section 403(h) [42 U.S.C. § 603(h)] . . . whether the actual operation of such programs in each State conforms to the requirements of this part . . . .

Thus, while SSA § 452(a)(4), 42 U.S.C. § 652(a)(4), did not itself contain the term "substantial compliance", the cross-reference to SSA § 403(h), 42 U.S.C. § 603(h), incorporated that term for the purpose of certain federal audits.

The new Act contains a provision substantially similar to prior SSA § 403(h). Reconciliation Act § 103(a)(1) (Conf. Rep. 43-44), which adds SSA § 409(a)(8), 42 U.S.C. § 609(a)(8). SSA § 452(a)(4), 42 U.S.C. § 652(a)(4), however, has been significantly changed.

The new Act has a separate Title, "Title III—Child Support", which is sixty-four pages long. Title III contains Subtitle E—Program Administration and Funding (Conf. Rep. 132), which in turn contains a section, Reconciliation Act § 342, entitled "Federal and State Reviews and Audits". Conf. Rep. 134-35. Section 342 reads, as here pertinent, as follows:

> (a) *State Agency Activities*—Section 454 (42 U.S.C. § 654) is amended . . . by inserting after paragraph (14) the following new paragraph:
>
> > "(A) A process for annual reviews of and reports to the Secretary on the State program operated under the State plan approved under this part, including such information as may be necessary to measure State compliance with Federal requirements for expedited procedures, using such standards and procedures as are required by the Secretary, under which the State agency will determine the extent to which the program is operated in compliance with this part; and—
> >
> > (B) a process of extracting from the automated data processing system required by paragraph (16) and transmitting to the Secretary data and calculations concerning the levels of accomplishment (and rates of improvement) with respect to applicable performance indicators (including paternity establishment percentages) to the extent necessary for purposes of sections 452(g) and 458 [42 U.S.C. §§ 652(g), 658]."[2]
>
> (b) *Federal Activities.*—Section 452(a)(4) (42 U.S.C. § 652(a)(4) is amended to read as follows:

[2] SSA §§ 452(g) and 458, 42 U.S.C. §§ 652(g) and 658, establish formulas for assessing the *outcomes* of the states' child support service efforts, by assessing the extent to which whether state programs are actually making paternity determinations (§ 452(g)) and the cost efficiency with which states are actually collecting child support payments.

"(4)(A) review data and calculations transmitted by State agencies pursuant to section 454(15)(B) on State program accomplishments with respect to performance indicators for purposes of subsection (g) of this section and section 458.

(B) review annual reports submitted pursuant to section 454(15)(A) and, as appropriate, provide to the State comments, recommendations for additional or alternative corrective actions, and technical assistance; and

(C) conduct audits, in accordance with the Government auditing standards of the Comptroller General of the United States—

(i) at least once every three years (or more frequently, in the case of a state which fails to meet the requirements of this part concerning performance standards and reliability of program data) to assess the completeness, reliability, and security of the data and the accuracy of the reporting systems used in calculating performance indicators under subsection (g) of this section and section 458;

(ii) of the adequacy of financial management of the State program operated under the State plan approved under this part, including assessments of—

(I) whether Federal and other funds made available to carry out the State program are being appropriately expended, and are properly and fully accounted for; and

(II) whether collections and disbursements of support payments are

carried out correctly and are fully accounted for; and

(III) for such other purposes as the Secretary may find necessary." [Conf. Rep. 134-35] [3]

Among other major differences between the new provision and prior 42 U.S.C. § 652(a)(4) is the exclusion of any cross-reference to the pertinent penalty provisions of Part IV-A, now SSA § 409(a)(8), 42 U.S.C. § 609(a)(8).

(d) The language of Part IV-D setting out the basic child support services obligations of the states has been changed as follows:

Section 454 of the Social Security Act, 42 U.S.C. § 654, provides:

A State plan for child and spousal support must—

. . . (4) provide that Such State will undertake—

(A) in the case of a child born out of wedlock with respect to whom an assignment under section 602(a)(26) of this title . . . is effective, to establish the paternity of such child, unless the agency administering the plan of the State under part A of this subchapter determines in accordance with the standards prescribed by the Secretary pursuant to section 602(a)(26)(B) of this title that it is against the best interests of the child to do so . . . and

(B) in the case of any child with respect to whom such assignment is effective . . . to secure support for such child from his parent (or from

[3] This amendment is "effective with respect to calendar quarters beginning 12 months or more after the date of the enactment of this Act." Reconciliation Act § 342(c); Conf. Rep. 135.

any other person legally liable for such support) and from such parent for his spouse (or former spouse) receiving aid to families with dependent children or medical assistance under a State plan approved under subchapter XIX of this chapter, but only if a support obligation has been established with respect to such spouse, and only if the support obligation established with respect to the child is being enforced under the plan), utilizing any reciprocal arrangement adopted with other States (unless the agency administering the plan of the State under part A or E of this subchapter determines in accordance with the standards prescribed by the Secretary pursuant to section 602(a)(26)(B) of this title that it is against the best interests of the child to do so), except that when such arrangements and other means have proven ineffective, the State may utilize the Federal courts to obtain or enforce court orders for support. . . .

And, SSA § 454(6)(A), 42 U.S.C. § 654(6)(A), requires that a state plan provide that:

> the child support collection or paternity determination services established under the plan shall be made available to any individual not otherwise eligible for such services upon application filed by such individual with the State, including support collection services for the spouse (or former spouse) with whom the absent parent's child is living (but only if a support obligation has been established with respect to such spouse, and only if the support obligation established with respect to the child is being enforced under the plan). . . .

Reconciliation Act § 301 amends SSA § 454(4), 42 U.S.C. § 654(4), by: striking paragraph (4) and inserting a new paragraph (4) requiring that the State provide

services relating to establishment of paternity and establishment, modification, or enforcement or child support for:

> (i) each child for whom assistance is provided under the State program funded under part A of this title . . . unless, in accordance with paragraph (29), good cause or other exceptions exist;
>
> (ii) any other child, if an individual applies for such services with respect to the child; and
>
> (B) enforce any support obligation established with respect to—
>
> (I) a child with respect to whom the State provides services under the plan; or
>
> (II) the custodial parent of such a child. [Conf. Rep. 99.][4]

Reconciliation Act § 301(a)(2)(A) also eliminates present SSA § 464(6)(A), 42 U.S.C. § 654(6)(A).

The language and structure differences between the old and new versions of 42 U.S.C. § 654(4) and 654(6) appear to be simply clarifications of present law. *See* H.R. Rep. 104-651, 104th Cong., 2d Sess. (1996) at 1997; Budget Reconciliation Recommendations of the Committee on Finance, 104th Cong. 2d Sess., at 80. However, the designee of the Secretary of Health and Human Services has had no opportunity pursuant to her explicit authority to set standards for State programs under the statute to confirm that the new language requires no changes in those standards. *See* 42 U.S.C. § 652(1) (The Secretary's designee shall "establish such standards for State programs for locating absent parents, establishing paternity, and obtaining child support and

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[4] It appears that this provision is "effective with respect to periods beginning on and after October 1, 1996." Reconciliation Act § 395; Conf. Rep. 161.

support for the spouse (or former spouse) with whom the absent parent's child is living as he determines to be necessary to assure that such programs will be effective.")

(e) The Reconciliation Act replaces the Part IV-D section governing the "Distribution of Proceeds," SSA § 457, 42 U.S.C. § 657, with an entirely new provision entitled "Distribution of Collected Support." Reconciliation Act § 302; Conf. Rep. 100-101.

The prior provision, as presently in force,[5] provides that:

> (1) of such amounts as are collected periodically which represent monthly support payments, the first $50 of any payments for a month received in that month, and the first $50 of payments for each prior month received in that month which were made by the absent parent in the month when due, shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month;
>
> (2) such amounts as are collected periodically which are in excess of any amount paid to the family under paragraph (1) and which represent monthly support payments shall be retained by the State to reimburse it for assistance payments to the family during such period . . .;
>
> (3) such amounts as are in excess of the amounts retained by the State under paragraph (2) and are not in excess of the amount required to be paid during such period to the family by a court or administrative order shall be paid to the family; and
>
> (4) such amounts as are in excess of amounts required to be distributed under paragraphs (1), (2)

[5] The amendments to 42 U.S.C. § 657 are effective "on October 1, 1996, or earlier at the State's option." Reconciliation Act § 302(c); Conf. Rep. 104.

> and (3) shall be (A) retained by the State . . . as reimbursed for any past assistance payment made to the family for which the State has not been reimbursed or (B) if no assistance payments have been made by the State which have not been repaid, such amounts shall be paid to the family. [42 U.S.C. § 657(b)]

This entire provision, including the $50 "pass through" payment, is eliminated in the Reconciliation Act. Rather, with respect to "families receiving assistance," the Reconciliation Act provides that it is up to the state whether to "retain, or distribute to the family, the State share of the amount so collected." Reconciliation Act § 302, amending SSA § 457(a)(1); 42 U.S.C. § 657(a)(1); Conf. Rep. 100.

With respect to "Families that Formerly Received Assistance", the Reconciliation Act has complex provisions governing the distribution of support payments. Previously, when support arrearages were collected, states were first reimbursed for past assistance payments to the family. 42 U.S.C. § 657(b)(4). Now, families no longer receiving assistance will in many circumstances be paid the arrearages accrued when they were not receiving assistance before the state is entitled to reimbursement for any past amounts paid to the family as assistance. Reconciliation Act § 302, amending SSA § 457(a)(2); Conf. Rep. 100.

(f) The remainder of the extensive amendments to Part IV-D, in the main, establish even more stringent requirements for states that accept federal funds to pay for IV-D services and for IV-A assistance payments than the prior statute, including: time limits for distributing support services, additional requirements for wage withholding procedures, standards for expedited administrative procedures for paternity and child support adjudications, mandates for penalties for nonpayment of child support including

suspension of professional licenses and drivers' licenses, additional requirements for review and modification of child support obligations, and mandatory enforcement of child obligations against grandparents when the children are minors. Reconciliation Act §§ 312, 304, 314, 325, 331, 369, 370, 351 & 373.